IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 5.

STATE OF NEW YORK AND SARATOGA SPRINGS COMMISSION AND SARATOGA SPRINGS AUTHORITY, *Petitioners*,

v.

UNITED STATES OF AMERICA.

BRIEF AMICUS CURIAE OF THE AMERICAN PUBLIC POWER ASSOCIATION.

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Introduction.

This brief *amicus curiae* is submitted on behalf of The American Public Power Association. This Association is a nonprofit service corporation, organized under the laws of the District of Columbia. Its membership includes, among others, the following power systems, owned and operated by states or their political subdivisions:

Consumers Public Power District, Columbus, Nebraska; Department of Public Utilities, Colorado Springs, Colorado; Light and Power Department, Hudson, Massachusetts; Imperial Irrigation District, Imperial, California; Board of Public Utilities, Jamestown, New York; Board of Public Utilities, Kansas City, Kansas; Electric Power and Water Board, Knoxville, Tennessee; Lower Colorado

River Authority, Austin, Texas; Department of Water and Power, Los Angeles, California; Board of Water and Electric Light Commissioners, Lansing, Michigan; Memphis Light, Gas and Water Division, Memphis, Tennessee; Department of Lighting, Seattle, Washington; Electrical Department, Springfield, Illinois; and Borough Electric Works, Wallingford, Connecticut.

Certain federally operated power systems also subscribe to the services of the Association, but the Association does not purport to speak for any federal project or power system in the submission of this brief.

On October 8, 1945, the Court notified counsel in this case that they were requested to address themselves in their briefs and on oral arguments to two questions; and it is to these questions that the present brief is directed, restricted to the relation of these questions to the properties, activities and revenues of the state and municipal power systems of the country. The exhaustive review of the authorities contained in the briefs of the State of New York and of the Attorneys General, *amici curiae*, with which we are in accord, need not be repeated here.

The basic rule, which has been stated many times by this Court, declares that "the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them are . . . . exempt from taxation by the United States." *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 575 (1929). In general see also, *Ohio* v. *Helvering*, 292 U. S. 360, 365 (1934); *South Carolina* v. *United States*, 199 U. S. 437, 461 (1905); *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 157, 158 (1910); *U. S.* v. *California*, 297 U. S. 175, 184 (1936); *University of Illinois* v. *United States*, 289 U. S. 48, 59 (1933); *Brush* v. *Commissioner of Internal Revenue*, 300 U. S. 352, 371, 372 (1937).

Question I.

"1. May Congress constitutionally include for taxation in a generally applicable taxing act any state property or activity or the income derived by the state from them, or any other source, so long as the tax does not discriminate against the state, or so long as the tax is not laid on the interest taxed, merely because it is that of a state—and if income of a private person from a like source may be constitutionally taxed?"

Congress has never asserted the power to tax income derived by a state or its political subdivisions from its service of electricity to its citizens, nor to tax the properties utilized for such service or the activities represented thereby. It is questionable whether Congress ever will assert such a power, in view of the uniform course of Federal legislation designed to promote, encourage and expand municipal power ownership, referred to later.

But, as to the constitutional question presented, we respectfully suggest that the answer should be in the negative if the property, income or activity relates to a public service rendered by the state to its citizens. That is to say, the state and its political subdivisions may themselves supply to their citizens water, electricity, police protection, fire protection, sanitation, harbors, and perform any other activity directly related to the public health, safety and welfare, and in so doing are exercising governmental functions. *Brush* v. *Commissioner of Internal Revenue*, 300 U. S. 352, 370, 371 (1937). All of these are manifestly public services, and are subject to the absolute control of the state, which may grant or prohibit exercise thereof by private persons. The state is not obliged to delegate these functions, nor on the other hand, do they lose their close relationship to the public health, safety and welfare because some states do delegate some or all of them. *Brush* v. *Commissioner of Internal Revenue*, 300 U. S. 352, 371, 372

(1937). They are functions which state governments must perform or cause to be performed, even at a loss, if society and hence the state are to continue to function. Where the state causes them to be performed under franchise, they are licensed private ventures into a governmental field. The private venturer gains no tax immunity by entering the domain of the state's function under its franchise, but the state loses none by occupying its domain in full and excluding the entrepreneur.

Question II.

> "2. To what extent may a state, by enlarging its property ownership or its activities, withdraw from the reach of Federal taxing power property and income which are normally subject to Federal taxation when owned or received by private persons? See *United States* v. *California*, 297 U. S. 175, 184, 185, and cases cited?"

We believe that the answer suggested to the first question applies to the second: that the decision by the state or its political subdivisions to furnish directly the services required for its citizens' health, safety and general welfare, and hence necessary to its own continued existence, is not an enlargement of its functions, but an occupation of fields inherently governmental, even though this occupation displaces private persons theretofore occupying them by leave and franchise of the state.

If, however, the state must show that it has "traditionally" occupied the field, as suggested in *United States* v. *California*, 297 U. S. 175, 184, 185, cited in the Court's question, the proof, as to local public ownership of power systems, is at hand.

Historically, local public power ownership has as long a lineage, and as distinguished an ancestry, as private ownership. The first central generating station in the United States, the New York-Pearl Street Steam Station, was

placed in operation September 4, 1882, and the first hydraulic generating plant was placed in operation at Appleton, Wisconsin, October 15, 1882. Both were financed by private capital, but by the end of the same year four municipally owned electric utilities were in operation. See Department of Commerce, Special Census Report on Central Electric Light and Power Stations, 1902. By 1900, 732 municipally owned systems had been established, including Lansing, Michigan 1892, Austin, Texas 1895, Tacoma, Washington 1893, Columbus, Ohio 1899. By 1944, state and municipal systems had over 5,000,000 kilowatts of installed capacity, out of a total of 50,524,000. Federal systems had an additional 5,000,000 kilowatts, bringing the generating capacity of publicly owned systems, both state and Federal, to nearly 20 percent of the total for the nation. These systems produced over 43,000,000,000 kilowatt hours of energy, divided 15,000,000,000 for state and local and 28,000,000,000 for Federal systems out of a total for the entire country of roughly 231,000,000,000 kilowatt hours. See January 20, 1945 issue of Electrical World, P. 89.

If tradition is the test, the unbroken line of Federal statutes giving preference to states and municipalities in the use of sites under Federal control and in utilization of power generated by Federal projects, is entitled to weight in proof of the long and proper presence of the states and their political subdivisions in this field. Public power ownership as a traditional and usual function of local government has been recognized by every Federal statute touching the subject. The municipal power systems have never been treated by Congress as interlopers in a Federal tax preserve, but as long-established occupants of their legitimate governmental field in the service of their citizens. See he Act of April 16, 1906, sec. 5 (34 Stat. 117, U. S. C. Title 43, sec. 522), giving "preference to municipal purposes" in disposition of surplus power on reclamation projects. This was the first Federal statute dealing with electric power generated on government projects. Cf. Reclamation Power

Act of February 24, 1911 (36 Stat. 930); Federal Water Power Act, (Act of June 10, 1920, c. 285, sec. 7, 41 Stat. 1067; U. S. C., Title 16, sec. 800); Boulder Canyon Project Act, (Act of December 21, 1928; 45 Stat. 1057, ch. 42, sec. 5 c; U. S. C. Title 43, ch. 12 A, Sec. 617 d (c)); Bonneville Project Act (Act of August 20, 1937, ch. 720, sec. 4, 50 Stat. 731, 16 U. S. C. 832); Tennessee Valley Authority Act (Act of May 18, 1933, c. 32, sec. 10, 48 Stat. 64; U. S. C. Title 16, sec. 831 i); Fort Peck Project Act (Act of May 18, 1938, ch. 250, sec. 4, 52 Stat. 403, 16 U. S. C. 833); The Reclamation Project Act of 1939 (Act of August 4, 1939, ch. 418, 53 Stat. 1187, sec. 9 c; 43 U. S. C. 485); Water Conservation and Utilization Act of 1940, (Act of October 14, 1940, 54 Stat. 1119, sec. 9, ch. 861); Flood Control Act of 1944 (Act of December 22, 1944, 58 Stat. 890, sec. 5, 16 U. S. C. 825s).

Conclusion.

The constitutional immunity of municipal power ownership is sustained under any standard heretofore suggested in the leading decisions of this Court, that is to say, whether the activity is required to be "strictly governmental in character" *South Carolina* v. *United States*, 199 U. S. 437, 461 (1905), "employed in carrying on the governmental operations of the state" *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 157 (1910), "usual governmental functions" *Helvering* v. *Powers*, 293 U. S. 214, 225 (1934), "activities in which the states have traditionally engaged" *United States* v. *California*, 297 U. S. 175, 185 (1936), or affording protec-

tion "to the continued existence of the state" *Helvering* v. *Gerhardt*, 304 U. S. 405, 421 (1938).

Washington, D. C., November 29, 1945.

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